BOARD OF INQUIRY *(Human Rights Code)*

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Eleanor Iness, dated January 10, 1995, alleging discrimination in accommodation on the basis of receipt of public assistance by Caroline Co-operative Housing Inc.;

B E T W E E N:

Ontario Human Rights Commission

-and-

Eleanor Iness

Complainant

-and-

Caroline Co-operative Housing Inc.
and Canada Mortgage and Housing Corporation

Respondents

INTERIM DECISION

Adjudicator: Mary Anne McKellar

Date: July 13, 2001

Board File No.: BI-0320-00

Decision No.: 01-016-I

INTRODUCTION

This is an interim decision respecting case management issues arising out of the request by the Canada Mortgage and Housing Corporation ("CMHC") for a stay of proceedings pending the determination of an Application for Judicial Review it intends to bring in respect of the Board's interim decision dated June 13, 2001, whereby CMHC was made a party to the Complaint of Eleanor Iness, dated January 10, 1995.

THE ISSUES

The Board has received a considerable amount of correspondence from the parties since the release of its June 13, 2001 decision. For clarity, the issues that have been raised in these letters, and which the Board feels require some case management at this time are as follows:

(1) CMHC's request for a stay pending the determination of its intended judicial review application;

(2) CMHC's request for an extension of time to file its response until after the Board has determined whether or not to grant a stay; and

(3) The Complainant's request that hearing dates be set.

THE PARTIES' POSITIONS

In some cases, the parties have already indicated their positions on the above issues.

Both the Ontario Human Rights Commission ("the Commission") and the Respondent, Caroline Co-operative Housing Inc. ("Caroline") consent to CMHC's request for a stay pending the determination of its intended judicial review application. The Complainant opposes this request.

The Commission also consented to CMHC's request for an extension of time to file its Response until after the Board had determined whether to grant a stay. Caroline did not indicate its position on this issue. The Complainant consented to an extension, provided the issue of the

stay could be dealt with by September 4, 2001, and indicated that it would respond to any further requests for an extension past that date as they arose. This position was set out in a letter dated July 5, 2001 from CMHC to the Board.

By letter dated July 5, 2001, the Board advised the parties that "CMHC's response need not be filed until after a determination of whether or not a stay will be granted."

The Complainant subsequently wrote to the Board directly. The Complainant's letter dated July 6, 2001, sets out her opposition to the granting of a stay, and also contains the following paragraph:

> Even if the Respondent CMHC could establish sufficient factors weighing in favour of a stay of the commencement of hearing in this matter pending the application to Divisional Court, the complainant is of the view that Respondent CMHC should provide a Response to the Statement of Facts and Issues to enable the parties to continue to prepare for hearing. Furthermore, even if the Respondent CMHC could establish sufficient factors weighing in favour of a stay of the commencement of hearing in this matter pending the application to Divisional Court, the complainant would request that hearing dates for this complaint be scheduled now rather than after the completion of the application in order that further delay would be avoided.

Having regard to the correspondence that preceded it, the Board interprets the Complainant's July 6, 2001 letter not as disputing the Board's July 5, 2001 direction that CMHC's response need not be filed until after the stay had been determined, but as clarifying its position that once the stay request had been dealt with, such Response should be filed promptly, even should the Board decide to grant the stay. Consequently, the other parties should be prepared to address this matter in the context of any submissions they make in respect of the stay request.

HOW TO PROCEED

Since the Complainant opposes CMHC's request for a stay, the Board is of the view that it must have submissions from the parties prior to determining whether or not to grant a stay. The Board proposes to deal with the request for a stay by way of written submissions. Counsel for CMHC is on vacation until the end of July. The Board is not aware of the vacation schedule or prior hearing commitments of the other parties. The Board directs CMHC to provide it with written submissions in support of its request for a stay by **August 8, 2001**. In the event the Commission and Caroline wish to make submissions in support of the request for a stay, they are directed to do so in writing by the same date. The Complainant is directed to provide the Board and the other parties with its written submissions in response to CMHC's submissions by **August 15, 2001**. CMHC may file reply submissions by **August 20, 2001**.

In their submissions the parties will be expected to address the Board's previous decisions in *Fiorini v. Di Poce Management Ltd.*, [1997] O.H.R.B.I.D. No. 4, and *Moffat v. Kinark Family and Child Services*, (BI 0056-95) (unreported decision dated December 13, 1995). Copies of these decisions are enclosed. The parties will note the Board's expressed disinclination to consider the question of a stay in the absence of a perfected Application for Judicial Review.

The Board will undertake to decide the issue as soon thereafter as possible, and in any event prior to September 7, 2001.

The Board declines the Complainant's request that it convene a conference call for the scheduling of hearing dates at this time. The Registrar will contact the parties shortly with respect to this matter.

Dated at Toronto, Ontario, this 13^{h} day of July, 2001

Mary Anne McKellar, Vice Chair

Indexed as:

Fiorini v. Di Poce Management Ltd.

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, c. H.19, as amended
AND IN THE MATTER OF the complaint by Monica Fiorini dated November 15, 1991, alleging discrimination in employment on the basis of sex

Between
Ontario Human Rights Commission, and
Monica Fiorini, complainant, and
Di Poce Management Limited, John Di Poce and Karen Stewart, respondents

[1997] O.H.R.B.I.D. No. 4
Decision No. 97-003-I
Board File No. BI-0097-96

Ontario Board of Inquiry (Human Rights Code)
M.A. McKellar, Board of Inquiry

February 4, 1997
(9 pp.)

Appearances:

Cathryn Pike, for the Ontario Human Rights Commission.
Paul Wise, for Monica Fiorini.
Peter Israel and Christopher Andree, for Di Poce Management Ltd., John Di Poce and Karen Stewart.

INTERIM DECISION

THE ISSUES

¶ 1 This interim decision deals with a request by the Respondents for a stay of the proceedings before the Board of Inquiry pending the outcome of the judicial review application brought in respect of an interim decision in this matter dated November 1996 and made by a different panel of the Board of Inquiry. The Ontario Human Rights Commission and the Complainant consented to the granting of the stay.

¶ 2 This interim decision also deals with a request by the Respondents and the Complainant for the adjournment of several hearing days. This request was not opposed by the Commission.

THE DECISIONS

¶ 3 At the hearing on January 30, 1997, I rendered an oral decision refusing to grant a stay.

¶ 4 At the hearing on January 30, 1997, I rendered an oral decision adjourning some, but not all, of the days

for which adjournments had been requested.

THE FACTS

¶ 5 This complaint was referred to the Board of Inquiry and assigned by the Chair to Mary Woo Sims for adjudication. She commenced the hearing by way of conference call on June 20, 1996 and convened a day of hearing to deal with preliminary matters. Those preliminary matters were disposed of by her in a written interim decision dated November 7, 1996 ("the Sims Decision"). One of the matters decided by the Sims Decision related to whether the Board of Inquiry was obliged, as the Respondents asserted, to maintain a verbatim record of the proceedings before it.

¶ 6 The Sims Decision held that the Board was not obliged to do so as the section of the Code which had formerly required Board of Inquiry proceedings to be transcribed had been repealed. Although some of the Board of Inquiry's Toronto hearing rooms are equipped with audio recording devices, the Sims Decision refused the Respondent's request that she activate the recording equipment. The basis for this refusal to exercise discretion to make an audio recording, set out more fully in the Sims Decision itself, was twofold: the Tribunals' Office policy dictated that such recordings were to be made only for the purposes of accommodating the needs of any counsel, advisors, parties or adjudicators in a hearing who suffer from a disability, and no one in this hearing fell within that category; and no party raised any other compelling reasons for making a recording. Her refusal to turn on the tape recorder is the decision that the Respondents seek to have quashed on judicial review.

¶ 7 Subsequent to the filing of the Application for Judicial Review, two things occurred: (1) the Respondents wrote to the Tribunals' Office requesting a stay of the proceedings; and (2) Ms. Sims resigned from the Board of Inquiry.

¶ 8 By facsimile transmission, the Tribunals' Office sent the following letter to the parties dated January 15, 1997:

> The Chair of the Board of Inquiry has asked me to advise you that Mary Woo Sims has been appointed as the Chief Commissioner of the British Columbia Human Rights Commission. Ms. Sims tendered her resignation to the Chair on January 7, 1997, with her last day being February 24, 1997.
>
> Given that Ms. Sims will be unable to continue to hear the complaint to its conclusion, the Chair intends to re-assign the hearing to another member of the Board of Inquiry panel, pursuant to his authority under section 35(8) of the Human Rights Code. The case file, including the motion for the stay of the proceedings and the Respondents' letter of January 14, 1997, has not yet been forwarded to the new panel. This will be done by January 17, 1997, unless we are advised by any party by that date that they object to the re-assignment. The hearing day scheduled for January 28, 1997, is cancelled. (emphasis in original)

¶ 9 No party advised the Tribunals' Office that it objected to the re-assignment, and the file was forwarded to me. It included a letter from Respondents' counsel, dated January 13, 1997, addressed to the attention of Mary Woo Sims.

It read, in part:

> ... the Responding Parties have proposed to bring a motion before you to stay these proceedings pending the outcome of the Application for Judicial Review.
>
> I am pleased to advise you that Ms. Pike, counsel for the Ontario Human Rights Commission, and Mr. Wise, counsel for the complainant, have consented to a stay of these proceedings

pending the outcome of the Application for Judicial Review. As such, counsel are in your hands with respect to formally issuing an Order staying these proceedings pending the outcome of the Application for Judicial Review.

I would propose that, provided you are so inclined, you simply issue an Interim Decision in accordance with this letter without the necessity of counsel appearing. However, if you wish us to appear, draft an Order, etc., please advise and all counsel would be pleased to do so.

¶ 10 By letter dated January 23, 1997, the Tribunals' Office advised the parties as follows:

This is to advise you that the request for a stay of proceedings will be dealt with at the hearing scheduled for Thursday, January 30, 1997. The parties are expected to attend and make full submissions in support of their positions, and to support such submissions with relevant legal authorities. (emphasis in original)

¶ 11 The parties attended before me on January 30, 1997. Notwithstanding the clear direction contained in the above letter, Respondents' counsel failed to adduce any legal authorities whatsoever in support of his request for a stay. Instead, he merely reiterated the fact of the other parties' consent to the granting of the stay, and indicated that in the absence of a stay there existed the potential, should the judicial review application be successful, that the hearing would be stopped in the middle and have to be restarted with the audio equipment activated. He further advised that the Application for Judicial Review would be perfected within the next couple of days and that it was his understanding that Divisional Court might be able to schedule the matter for hearing in March or April. Respondents' counsel did acknowledge that he had no control over when Divisional Court would actually hear the matter, or when it might render its decision. The extent of the Commission's and the Complainant's submissions was to indicate that each consented to the stay.

¶ 12 I asked all counsel if they had given any thought to how the concern prompting the request for a stay might be alleviated while the hearing proceeded. In particular, I advised that any party could, at its own expense, engage a court reporter to record the hearing. Counsel for the Respondents indicated that such an arrangement would not satisfy his client's interest, because the Board of Inquiry and not his clients has an obligation to pay for a verbatim record, and it would be "cumbersome" for the Board to reimburse his clients for the costs of a court reporter should the judicial review succeed.

¶ 13 No one suggested that I revisit the Sims Decision and consider whether the Application for Judicial Review created new and compelling reasons for me to exercise my discretion to turn on the audio equipment.

¶ 14 Respondents' counsel also advised me that both he and counsel for the Complainant had now booked other matters on days on which all counsel had previously agreed to be scheduled for this matter, and in respect of which notice had gone out. These two parties requested that five hearing days be adjourned: February 5, 6, 11 and 26 and March 5, 1997. Counsel for the Commission remained available for all dates. The submission made in support of the adjournment request was that the Tribunals' Office letter of January 15, 1997 was ambiguous, and the parties read the reference to the cancellation of January 28, 1997 as cancelling all scheduled days.

¶ 15 Finally, counsel for the Respondents indicated that he was considering bringing a motion to challenge the validity of the reassignment of the hearing to me, and my jurisdiction to hear and dispose of this matter. Counsel for the Commission expressed a concern that this issue be dealt with as expeditiously as possible.

REASONS

¶ 16 There is no automatic stay of the Board of Inquiry's proceedings when a judicial review application is made. Whether the proceedings are stayed is a discretionary matter for the member hearing the case to decide. A

stay is an extraordinary remedy, and in my view the party requesting it must clearly demonstrate that the balance of convenience overwhelmingly favours the granting of it. Counsel for the Respondents has failed to do that. Even though clearly directed to do so, he made no attempt to support his request with legal authorities.

¶ 17 The balance of convenience in this case favours the continuation of the proceeding. The interest that the Respondents assert in their judicial review application can be protected if they engage a court reporter to transcribe the hearing at their own expense. The fact that it might be "cumbersome" to recover some or all of the cost of doing so from the Board of Inquiry should the judicial review application succeed is not a significant enough factor to outweigh the undesirability of protracting these proceedings any further given the already considerable amount of time that has elapsed between the filing of the complaint with the Commission in the fall of 1991, its referral to the Board of Inquiry in the spring of 1996, and its adjudication in late 1996/97. If a stay is granted now pending the outcome of the judicial review application, it is conceivable that the matter will not proceed before the Board of Inquiry and be disposed of before the fall of 1997 at the earliest. In any litigious proceeding, the length of time that elapses between the actionable events and the adjudication with respect to them is a matter of concern as it may affect the quality of evidence proffered. Delay is of especially great concern in proceedings before administrative tribunals which are supposed to afford parties a means of expeditiously resolving their disputes. Given these concerns, I was frankly surprised that the Commission and the Complainant consented to the stay without any serious thought having been given to alternative means of protecting the Respondents' interest.

¶ 18 Because the granting of a stay is a discretionary matter, I feel it is appropriate for me to take into account in exercising that discretion, the fact that the Respondents did not see fit to ask Ms. Sims to revisit her decision to activate the audio equipment, nor did they ask me to consider the Sims Decision afresh in light of the changed circumstances raised by the judicial review application.

¶ 19 The request for the stay was premised on the potential duplication of proceedings should the judicial review application succeed and the matter have to be re-heard by the Board of Inquiry either in whole or in part. I have considered this factor, and in doing so, I have assessed the likelihood of the Respondents' succeeding on their judicial review application. While the Divisional Court may well have a different view of the matter, I view their chances of success as slim, given the amendment to the Code that repealed the Board's obligation to record proceedings before it.

¶ 20 I have taken into account the fact that the Commission and the Complainant consent to the granting of a stay. The fact of their consent does not relieve me of the obligation of ensuring that the balance of convenience favours the stay. I am concerned that granting a stay too lightly, or on the basis of the mere consent of the parties where a judicial review application is pending may create a perverse incentive for the bringing of such applications frivolously, thereby occasioning both delay in the delivery of administrative justice, and the disposition of matters before the courts.

¶ 21 I turn now to the issue of the adjournment. In my view, there was no ambiguity in the January 15, 1997 letter from the Tribunals' Office. The only hearing date it purported to adjourn was that of January 28, 1997. Even if it had been ambiguous, surely it was incumbent on the parties to clarify the status of the previously scheduled hearing dates with the Registrar prior to booking over them, or at the very least, when they received the January 23, 1997 letter advising them of the matters they should be prepared to address at the hearing on January 30, 1997, since this letter made it clear that all dates had not been adjourned. Concomitant with the re-booking of the scheduled hearing dates, I understand that all counsel in this case ceased exchanging various documents and engaging in various other matters that they would normally attend to prior to the commencement of a case on its merits. In my view, it was foolish of them to do so, but I nevertheless agreed that the commencement of the hearing on the merits should be postponed. I therefore ordered that the hearing on the merits will commence on February 11, 1997. I adjourned February 5, 1997 outright. I ordered that February 6, 1997, or some part of it will be

devoted to the hearing of any jurisdictional objection arising as a result of the re-assignment of the case to me, and that I would accede to their request should they request that any such motion be heard by conference call. In the event no such motion is brought, the hearing scheduled for February 6, 1997 will also be adjourned.

QL Update: 990708

qp/d/mop

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by James Moffatt dated November 26, 1991, alleging discrimination in employment on the basis of handicap and sexual orientation.

B E T W E E N :

Ontario Human Rights Commission

- and -

James Moffatt

Complainant

- and -

Harry Oswin
Kinark Child & Family Services

Respondents

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : December 13, 1995

Board File No: BI-0056-95

Decision No : 95-053-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Ena Chadha, Counsel
James Moffatt	)	Brian Kelsey, Counsel William S. Challis, Counsel
James Moffatt	)	On his own behalf
Harry Oswin Kinark Child & Family Services	)	Brian D. Mulroney, Counsel Lucy Siracco Jane Dawes

THE ISSUE

1. By decision dated December 6, 1995, I dismissed the Complainant's motion objecting to my jurisdiction to hear this matter ("the Jurisdictional Decision"). The Complainant now requests that I adjourn these proceedings while it pursues an application for judicial review in respect of the Jurisdictional Decision.

2. The Ontario Human Rights Commission ("the Commission") and the Respondent oppose the adjournment request.

THE DECISION

3. The December 1995 hearing dates are adjourned. If the conditions set out in the final paragraph of this decision are satisfied the January hearing dates will be adjourned as well.

THE BACKGROUND

4. The matters set out in the following four paragraphs are canvassed more fully in the Jurisdictional Decision itself. I am including this summary version of events here for the sole purpose of permitting this decision to be read as a stand-alone document.

5. In the Jurisdictional Decision, I held that the Chair of the Board of Inquiry ("BOI") acted within the authority conferred upon him by s. 35(8) of the *Human Rights Code*, R.S.O. 1990, c.H-19, as amended ("the *Code*") when he reassigned this case to me after another adjudicator had commenced the hearing by conference call. Accordingly, I found that I had jurisdiction to hear the matter. The Complainant's position was that the original adjudicator had to continue the hearing.

6. When the hearing reconvened on December 11, 1995, Counsel for the Complainant indicated his intention to make an application for judicial review of the Jurisdictional Decision.

7. Counsel for the Complainant also suggested that his intended application for judicial review might be heard together with an application made in respect of the preliminary decision of the BOI in the *Abouchar* case. The *Abouchar* decision also deals with the extent of the Chair's authority under s. 35(8) of the *Code*, specifically whether it authorizes the reassignment of a case in circumstances where the initial assignment was made prior to the proclamation of the amendments to the *Code* establishing the BOI as a statutory tribunal and vesting reassignment power in the Chair.

8. The reassignments in both *Abouchar* and in this case were predicated on what might broadly be termed "scheduling considerations". In addition to the issue outlined in the preceding paragraph, Counsel for the Complainant, who is also counsel for the applicant in the *Abouchar* judicial review, indicated that his argument to the Court in *Abouchar* may raise the issue of whether s. 35(3) permits reassignments based on scheduling considerations, although that issue did not form the basis of the challenged decision. That issue did form the basis of the challenge to my jurisdiction, and is precisely the issue addressed in the Jurisdictional Decision.

9. The judicial review application in *Abouchar* is scheduled to be heard on February 15, 1996. Counsel for the Complainant has not yet taken any steps to attempt to have the judicial review of the Jurisdictional Decision listed for hearing at the same time as *Abouchar*, but he has indicated his intention to do so.

THE ANALYSIS

10. There was no dispute between the parties that I have the jurisdiction to determine whether to adjourn this hearing pending the outcome of the anticipated judicial review proceedings, and that such determination involves an exercise of my discretion. The real point of departure for the Complainant and Respondent was with respect to how I should exercise that discretion. I should note at this point that while Commission Counsel opposed the adjournment request, she made no further submissions in support of her position.

11. Complainant Counsel's argument was simply that this hearing becomes a nullity if he is successful on his judicial review application. He submits that, because of this possibility, it would be undesirable to have the parties risk litigating the matter twice, once before me, and then once before the properly constituted panel (i.e. the adjudicator originally assigned). Furthermore, he argued that much of the delay that might otherwise be occasioned by an adjournment pending judicial review can be avoided if the intended judicial review application in this case can be heard together with the one in *Abouchar* on February 15, 1996.

12. In his very able and thoughtful submissions, Respondent Counsel took me through a close reading of the following cases: *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40 (Ont. C.A.); *University of Toronto v. C.U.E.W., Local 2* (1988), 65 O.R. (2d) 268 (Div. Ct.); *Roosma v. Ford Motor Co. of Canada Ltd.* (1988), 66 O.R. (2d) 18 (Div. Ct.); *Ghosh v. Domglas Inc.* (1991), 16 C.H.R.R. D/16 (Ont. Bd. Inq.); and *Great Atlantic & Pacific Co. Of Canada Ltd. v. Ontario (Minister of Citizenship) et al.* (1993), 62 O.A.C. 1 (Div. Ct.). The following principles emerge from that reading:

a. Administrative tribunals are designed to provide for the expeditious resolution of disputes. Delays or interruptions in that process are to be avoided.

b. Such delays or interruptions occasioned by judicial review proceedings should be avoided except in "exceptional circumstances".

c. The mere fact that a matter is jurisdictional in nature does not constitute an exceptional circumstance, nor does it alleviate the need for a "factual grounding", without which the reviewing court cannot properly asses the jurisdictional issue.

d. In determining whether exceptional circumstances exist such that an adjournments should be granted, I should consider whether the issue grounding the judicial review application is a substantial one worthy of judicial deliberation, and in so doing I should assess the strength or weakness of the case for judicial review.

e. If the issue is a substantial one, the question of whether to grant an adjournment should then be decided on the basis of the balance of convenience.

13. I adopt the above principles, with one reservation, which will become apparent below.

14. I am not comfortable second-guessing my own decision in order to assess the likelihood of success on judicial review, particularly when the issues raised before me were somewhat novel and have not previously been commented on by the courts. In my view, the "substantial" nature of the issue for judicial deliberation can be measured not just by assessing the strength or weakness of the judicial review application, but also by having regard to such factors as whether it relates to a "settled" or "novel" area of law and whether the outcome of the judicial review may impact significantly on the tribunal's delivery of services. The fact that the Jurisdictional Decision deals with a section of the *Code* conferring new powers on the Chair, along with the potential impact on delivery of service that any determination of the scope of the Chair's authority to reassign cases may have, persuades me that the "substantial issue" test has been met.

15. I am cognizant of the delay that is attendant upon any adjournment of proceedings, and note that a delay of any duration may have undesirable consequences in a case where many of the important findings, so I am told, will be resolved on the basis of credibility. I am also cognizant of the Respondent's desire for some closure in these proceedings, which initiated with a complaint filed in 1991. Nevertheless, I have determined that on the peculiar facts of this case, the balance of convenience at this time favours the granting of the adjournment. There are three factors which compel me to this result.

16. This case is not like most cases in which preliminary jurisdictional matters are raised and judicial review of those jurisdictional determinations sought. In the typical case, the jurisdictional challenge relates to the jurisdiction of the tribunal, not the jurisdiction of the particular adjudicator. In those situations, the impact of the tribunal refusing an adjournment request pending judicial review and then having its decision quashed, is that the case dies. It does not get remitted to another panel of the tribunal because the finding is that the tribunal itself has no jurisdiction over the matters raised. As it turns out, the parties may have participated needlessly in one hearing, but at least they do not have to duplicate their efforts before another panel. By contrast, because the jurisdictional challenge in this case relates to the jurisdiction of a particular adjudicator to hear the matter, and not to the jurisdiction of the BOI over the subject matter of Mr. Moffat's complaint, the outcome of a successful judicial review application here would involve the entire matter being reheard. In that respect, this case is conceptually similar to *Great Atlantic & Pacific Co. Of Canada Ltd. v. Ontario (Minister of Citizenship) et al.*, in which the Divisional Court quashed the adjudicator's refusal of an adjournment pending judicial review in circumstances where one of the issues for the Court's review was her decision not to remove herself on the basis of a reasonable apprehension of bias.

17. In assessing the balance of convenience, I have also had regard to the fact that the parties wish to adduce evidence from witnesses who are out of the jurisdiction. I was advised that one witness resides in northern British Columbia, and the other in Australia. A Notice of Motion has been filed seeking permission to have their evidence adduced by conference call, but this motion is opposed, and has yet to be argued. In this case, then, not only is there the possibility that the hearing would be duplicated, but that such duplication would be extraordinarily costly should the parties be required to call these witnesses twice.

18. Finally, the balance of convenience at this time appears to favour granting the requested adjournment because of the possibility of "piggybacking" the intended judicial review application of the Jurisdictional Decision on the *Abouchar* matter and minimizing the delay that might otherwise accompany such an adjournment.

19. The factors I have taken into account in paragraphs 17 and 18 above may change with the passage of time. For example, the parties could reach agreement on the issue of my receipt of electronic evidence, and that agreement could influence me to consent to hearing the testimony in that fashion. More significantly, the expedition with which I have been willing to assume that this judicial review application will be commenced and heard could prove to be illusory. The Complainant could fail to take out a judicial review application, or take steps to attempt to have it heard with *Abouchar*,

or any attempts it does make in that direction could be unsuccessful. These considerations have informed my order, which I have attempted to make sufficiently flexible to take account of these or other changes in circumstance which may alter the balance of convenience to favour proceeding with the hearing.

THE ORDER

20. The hearing is adjourned subject to the following conditions. Should the Complainant fail to take out its application for judicial review forthwith; serve it on the other parties by December 22, 1995; and perfect it prior to the first scheduled hearing date in January, 1996, the hearing will proceed as scheduled on January 8, 1996. I expect the other parties to cooperate with the Complainant in his attempts to secure an early hearing date for the judicial review application. I direct the parties to advise me in writing as soon as practicable of the return date for the judicial review application. If the matter cannot be heard at the same time as *Abouchar* or, failing that, prior to March 31, 1996, then the hearing will resume. If any of the parties is of the view that there has been a change of circumstances that would alter my determination that the balance of convenience in this case favours the adjournment, those issues may be raised by written Notice of Motion pursuant to the BOI Interim Rules of Practice.

Dated: Dec 13/95

Mary Anne McKellar